IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1118

MARY L. JOHNSON, Administratrix *ad Prosequendum* and General Administratrix of the Estate of Leroy Johnson, Deceased, and LORETTA JOHNSON, Administratrix *ad Prosequendum* and General Administratrix of the Estate of Herbert D. Johnson, Deceased,

Petitioners,

vs.

ATLANTIC CITY ELECTRIC COMPANY,

Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States;

Respondent, Atlantic City Electric Company, respectfully prays that a Writ of Certiorari not issue to review the Judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on November 23, 1976, reversing the Order allowing plaintiffs to amend their complaint to include third party defendant, Atlantic City Electric Company, as an original party defendant of the United States District Court for the District of New Jersey, which Petition has been brought by Petitioners, Mary L. Johnson, Administratrix ad Prosequendum and General Administratrix of the Estate of Leroy Johnson, Deceased, and Loretta Johnson, Administratrix ad Prosequendum and General Administratrix of the Estate of Herbert D. Johnson, Deceased.

RESTATEMENT OF QUESTION PRESENTED

Whether a district court, in a diversity case where no federal question exists, may, without an independent jurisdictional basis invoke ancillary or pendent jurisdiction to permit plaintiffs to assert a state law claim against a third party defendant where no diversity exists between plaintiffs and third party defendant.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT INVOLVED

Respondent adopts the Constitutional provisions, Statutes and Rules of Court cited by Petitioners in their application citing in addition:

Federal Rule of Civil Procedure 12(h)(3):

> Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Federal Rule of Civil Procedure 82:

> These rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . .

The remainder of the Rule is not applicable.

COUNTER-STATEMENT OF THE CASE

This action remains pending in the U.S. District Court for the District of New Jersey and a separate action is pending in the New Jersey Superior Court, Law Division, Cumberland County, having been filed by Petitioners in the State Court on or about October 3, 1975. The State Court action is identical in all respects to this action with the single exception that Respondent, Atlantic City Electric Company is joined as an original party defendant. By agreement of the parties discovery conducted in the Federal action is applicable to the State Court proceeding to avoid duplicity.

Due to the pendency of these actions Respondent accepts the Statement of the Case as set forth by Petitioners for purpose of this application only, but specifically denies and disputes all factual conclusions asserted therein which remain topic of proof in the case below, particularly with regard to the relationship between the incident of October 5, 1973 and the ultimate demise of Herbert Johnson.

In addition, Petitioner overstates in asserting that this Respondent does not argue abuse of Discretion in the Decision of the District Court. This aspect of the case was fully briefed by Petitioner and was the subject of argument in the Court of Appeals for the Third Circuit, being considered by the Court in rendering its Per Curiam Decision. Respondent preserves all arguments both as to power and abuse of discretion.

The Opinion of the Third Circuit Court of Appeals has not been published in this matter but the reversal appears in a Third Circuit list and may be cited: 546 F.2d 417 (3rd Cir. 1976).

REASONS FOR DENIAL OF THE WRIT

Point I

The per curiam opinion of the Third Circuit Court of Appeals does not evidence a decision contrary to the opinions expressed by other circuit courts of appeal and is in agreement with the pronouncements of this honorable court and the pronouncement of the circuit courts of appeal which have addressed the matter in issue: whether, absent an independent jurisdictional basis and absent a federal question, in a diversity case, the district courts have the power to invoke either ancillary or pendent jurisdiction to permit plaintiffs to assert a state law claim against a third-party defendant, a citizen of the same state as plaintiff.

The Decision of the Third Circuit Court of Appeals consists of a two sentence Per Curiam opinion without elaboration or explanation. As such, in isolation, the decision stands for nothing more than the proposition that given the precise facts of this particular case, where there exists no Federal Question and where jurisdiction is founded solely upon Diversity of Citizenship, for purposes of prosecuting a State Law claim deriving from a common nucleus of operative fact, a non diverse third-party defendant cannot be elevated by plaintiff to the status of an original party defendant.

Being without elaboration or explanation, whether the decision was based upon a lack of power or an abuse of discretion is not apparent. Under this cricumstance, the decision is not one appropriate for review.

Nonetheless, if the decision below is to be examined, it cannot be considered in isolation but must be considered and read in conjunction with other decisions and action

by the Third Circuit Court of Appeals in similar cases. When so examined the decision reached by the Court below can be found to be consistent with the decisions of the other Circuit Courts of Appeal addressing the issue and likewise consistent with the pronouncements of this Honorable Court in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973); and *Aldinger v. Howard*, – U.S. –, 96 S.C. 2413 (1976).

Although Petitioners place strong reliance upon *Jacobson v. Atlantic City Hospital*, 392 F.2d 149 (3d Cir. 1968), *Jacobson* involved Federal Question jurisdiction and contained only dicta expressing the view of the Third Circuit Court of Appeals toward the applicability of ancillary or pendent jurisdiction in diversity cases. The late Chief Justice Hastie commented only

> . . . these considerations seem as applicable to cases in which Federal jurisdiction is based upon Diversity of Citizenship as to Federal Question cases. . . (392 F.2d 149, 155)

Jacobson cannot, however, be controlling in interpreting the present attitude of the Third Circuit Court of Appeals on this subject matter. In the first instance *Jacobson*, although following *Gibbs*, preceded *Zahn v. International Paper Co. (supra)*. *Zahn*, as did *Jacobson* involved a determination of Jurisdictional amount (28 U.S.C. 1332(a)) but in the setting of a class action under *Rule* 23(b)(3). The result was a dismissal of the class action where potential members of the class did not individually satisfy the jurisdictional amount requirement despite the fact that all named members of the class did satisfy the requirement.

In *Zahn* this Court was presented with the opportunity to expand the holding of *Gibbs* and thereby create a power in the Federal courts to hear all related claims once an action had been brought in a Federal Court despite the lack of both a Federal Question and independent jurisdictional basis. The dissenting opinion of Mr. Justice Brennan reveals that the opportunity for such expansion was presented, urged and considered but ultimately rejected in the 6 to 3 decision.

What can and should be considered in interpreting the present attitude of the Third Circuit Court of Appeals is the *per curiam affirmance* in *Joseph v. Chrysler Corp.*, 61 F.R.D. 347 (W.D.Pa.), *aff'd* 513 F.2d 626 (3rd Cir. 1975) and *Tully v. Mott Supermarkets Inc.*, 540 F.2d 187 (3rd Cir. 1976).

The former case was a diversity matter without federal question. The District court citing Wright & Miller, Federal Practice and Procedure, Sect. 1444, p. 229 correctly reasoned that a claim by plaintiff against a third party defendant, who is non-diverse as to plaintiff, may be asserted only if it meets individual jurisdictional requirements. Plaintiffs application to elevate was therefore denied.

The latter matter involved a shareholder class action alleging violation of Security Fraud Statutes. As a result of the existence of the Federal Question the state law claims asserted were decided by the Federal Court. In reversing, the Court of Appeals determined that the Plaintiff had no standing to assert the Federal Claim. In then discussing the propriety of entertaining the State Law claims the position of the Third Circuit Court of Appeals was expressed by Chief Judge Seitz—who presided below in this matter—

> . . . Pendent jurisdiction is essentially a discretionary doctrine designed to permit a party to try in one judicial proceeding all claims arising out of a 'common nucleus of operative fact' without regard to their federal or state character, where to do so would promote convenience and sound judicial administration. The power of the court to exercise pendent jurisdiction, though largely unrestricted, requires, at a minimum, a federal claim of sufficient substance to confer subject matter jurisdiction on the court. *Gibbs*, supra, 383 U.S. at 725, 86 S. Ct. 1130. . . (540 F.2d 187, 196)

and further, since the case below had actually gone to judgment stage and appeal to the Third Circuit

> . . . Notwithstanding the already substantial time devoted to the case and the expense incurred by the parties, we do not believe that the hallmark considerations of 'judicial economy, convenience, and fairness to litigants' dictate that the pendent claims be entertained. . .

and with particular applicability to the case at bar the Court concludes

> . . . our decision in no way prejudices the plaintiff's legal rights since they may obtain a full adjudication of their state law claims in a pending state court proceeding which was stayed, by agreement among the parties, until a final judgment was rendered in the instant case . . . the state forum is the preferable one to resolve the state issues raised and to obtain a 'surer-footed reading of applicable law' *Gibbs*, supra, 383 U.S. at 726, 86 S. Ct. 1130 (540 F.2d 187, 196)

Inherent in the Per Curiam decision in the case at bar may have been a well grounded belief that Plaintiffs state law claim, involving as it does New Jersey's somewhat unique standard of Statutory Comparative Negligence (*N.J.S.A.* 2A:15-5.1 *et. seq.*) would obtain a 'surer-footed reading of the applicable law' in the pending State Court

action. In the alterative, if Petitioner chooses not to pursue its state law claim in the state court, it is not prejudiced by continuing the action in Federal Court, under diversity of citizenship with Respondent continuing as a third party Defendant.

The test applied by the Third Circuit is in accord with the guidelines set down by Chief Justice Brennan in *Gibbs*

> . . . the State and Federal claims must derive from a common nucleus of operative fact. But, if, considered without regard to their Federal or State character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, *assuming substantiality of the Federal issues, there is power* in Federal Courts to hear the whole. . . (383 U.S. at 725 (Emphasis supplied))

These expressions are consistent with *Gibbs,* with *Zahn,* and appear consistent with the most recent pronouncement by this Honorable Court in *Aldinger v. Howard (supra),* which although on its limited facts involved an attempt by plaintiff in a civil rights action to assert a state law claim against a defendant not a party to the federal claim and over whom there was no independent basis of federal jurisdiction, nonetheless reaffirms the necessity for independent jurisdictional basis for purposes of joinder.

Neither pendent nor ancillary jurisdiction is therefore meant to be applicable where no independent basis for Federal jurisdiction exists other than 28 U.S.C. 1332(a) which basis itself would disappear upon joinder of a non-diverse party. To decide otherwise would be to open the floodgates to state court litigation in Federal courts and to sanction "bootstrapping" in its purest form, or, as termed by the Second Circuit Court of Appeals in *Kavit v. A. L. Stamm & Co.,* 491 F.2d 1176 (2d Cir. 1974), addressing this issue and arriving at a holding consistent with the Third Circuit Court of Appeals, "the dog would be wagged by the tail."

Looking to the remaining Circuit Courts of Appeal, the Fifth Circuit has not formally decided the precise issue raised herein. However, in *dicta* in *Revere Copper and Brass Inc. v. Aetna Casualty and Surety Co.,* 426 F.2d 709 (5th Cir. 1970) a pronouncement consistent with the Third Circuit Court of Appeals is set forth at footnote 9.

Saalfrank v. O'Daniel, 533 F.2d 325 (6th Cir. 1976), *cert. den.* 45 U.S.L.W. 330 (U.S. Nov. 1, 1976) poses the identical question raised in the case at bar. In a decision consistent with *Tully (supra),* relying upon the guidelines of *Gibbs,* the Sixth Circuit denied the exercise of ancillary jurisdiction of a direct claim by Plaintiff against a third party defendant, a citizen of the same state as Plaintiff, in a personal injury action, where the only basis for federal jurisdiction was diversity of citizenship. This result was achieved even though the claim arose out of the same operative facts.

Although Petitioners "recognize" two factually in apposite opinions of the Fourth Circuit Court of Appeals, *Kenrose Manufacturing v. Whitake v. Kilodyne,* 53 F.R.D. 491 (W.D. Va. 1971), *aff'd.* 512 F.2d 890 (4th Cir. 1972); and *Parker v. Moore,* 528 F.2d 764 (4th Cir. 1975), Respondent respectfully submits that the decisions are reconcilable and are consistent with the guidelines of *Gibbs (supra)* and the pronouncement of the Third Circuit Court of Appeals. The *Parker Court* in its opinion evidenced consistency with Kenrose stating ". . . we adhere to the ruling in Kenrose" *Parker v. Moore,* 528 F.2d 764, 766 (4th Cir. 1975).

The only other Circuit Court addressing this issue has been the Ninth Circuit. The decision and rationale of the Ninth Circuit was affirmed by this Honorable Court in *Aldinger v. Howard (supra).*

The Per Curiam Decision of the Third Circuit from which Petitioners seek review, when read in conjunction with *Joseph v. Chrysler Corp.* (*supra*) and *Tully v. Mott Supermarkets Inc.* (*supra*) cannot be interpreted to be inconsistent or at variance either with other Circuit Courts of Appeal or with the pronouncements of this Honorable Court on the subject of exercise of jurisdictional power under the limited facts of this case.

Point II

Given the complexities of the many manifestations of federal jurisdiction together with the countless factual permutations possible under the federal rules it would be both unwise and unnecessary to review the decision of the Third Circuit Court of Appeals. The area of ancillary and pendent jurisdiction does not permit a sweeping pronouncement and the resolution of jurisdictional questions arising out of the potential factual combinations and permutations are best left to be determined by the circuit courts, consistent with guidelines already established by this Honorable Court.

Point III

The decision of the Third Circuit Court of Appeals does not violate Federal Rule of Civil Procedure 14(a) but rather reaches a result mandated by Federal Rules of Civil Procedure 82(a) and 12(h)(3).

To destroy Diversity in a Diversity of Citizenship case where no Federal question is presented would mandate invocation of F.R.C.P. 12(h)(3) requiring dismissal of the action *Bevan v. Columbia Broadcasting System, Inc.*, 293 F. Supp. 1366 (D.C. Md. 1968). Accordingly the decision below was proper.

F.R.C.P. 14 out of which the doctrines of ancillary and pendent jurisdiction have been developed must be read in conjunction with the policies and purposes underlying federal jurisdictions as expressed in the Decisions of this Honorable Court as in *Gibbs (supra)*, *Zahn (supra)* and *Aldinger (supra)* and also in conjunction with F.R.C.P. 82 which provides that the Jurisdiction of the Federal Court will not be expanded beyond its constitutional limits. The decision of the Third Circuit Court of Appeals inherently recognizes the distinction between the State courts of general jurisdiction and the Federal courts of limited jurisdiction concluding that a cause of action grounded entirely upon a State claim cannot, without an independent jurisdictional basis continue in a Federal court. Nothing therein is contrary to F.R.C.P. 14 which must presume existence of jurisdiction for its applicability.

CONCLUSION

The Third Circuit in its Per Curiam Opinion cannot be said to have adopted an inflexible rule denying the grant of power to the District Courts to exercise discretion in granting ancillary jurisdiction. The Third Circuit Per Curiam opinion, when read in conjunction with other pronouncements by that Court consistent with the guidelines established by this Honorable Court results only in the conclusion that given the precise facts of this particular case ancillary jurisdiction is not proper. This decision, consistent with the result in *Saalfrank (supra)* is, therefore, not a proper case for review by this Honorable Court.

Respectfully submitted,

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